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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1229

HARVEY FRANKLIN FARMER,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondent,
(Real Party in Interest).

BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY

On or about January 30, 1970, the above-named petitioner (hereinafter called "Farmer") filed in this Court a motion and petition for a writ of mandate to

be directed to the Superior Court of California for Alameda County. The proceeding initiated by that motion and petition is identified upon this Court's records as No. 1634-Misc., October Term, 1969. Reference is hereby made to the reply brief in that proceeding filed on or about February 25, 1970, by this respondent (Great Northern) as Real Party in Interest therein.

The instant petition for certiorari involves the same parties and the same facts as No. 1634-Misc., and relies upon largely the same contentions as the petition in that proceeding.

As we show, however, there are certain reasons additional to those set forth in our opposing brief in the mandate proceeding, why the instant petition for certiorari should be denied.

THE FACTS

The essential facts, here again summarized for ready reference, are as follows:

Farmer, the petitioner, was at all material times employed by the respondent Great Northern as a locomotive engineer. On March 14, 1969, at Thama, Idaho, while so employed, he allegedly suffered an injury. Thama is a station on Great Northern's transcontinental main line, about 56 miles east of Spokane, Washington.

Great Northern was at all material times a corporation domiciled and having its principal headquarters in Minnesota, and engaged in business as a com-

mon carrier by railroad in interstate commerce. Great Northern's main lines extend westward from Minnesota to terminals in Washington and Oregon. Its operations in Washington are quite extensive. By contrast, its operations in California are minimal, consisting only of freight-train operations over some 63 miles of line in the extreme northeastern part of California. Farmer is, and at all material times has been, a citizen and resident of Spokane, Washington. So far as known, he has never resided in California.

On June 13, 1969, Farmer commenced an action against Great Northern in the Superior Court of California for Alameda County (the "trial Court"), by filing therein a Complaint for damages for the injuries allegedly suffered at Thama, Idaho, on March 14, 1969. This action was identified as No. 390601, and was expressly stated by Farmer as having been brought under the Federal Employers Liability Act, 45 USCA 51, et seq. ("FELA").

In due course, on October 3, 1969, Great Northern filed its motion to dismiss Farmer's action on the ground of *forum non conveniens*. This motion was based largely upon the decision of the Supreme Court of California in *Price v. A.T. & S.F. Ry. Co.* (1954), 42 C.2d 577, 268 P.2d 457 (cert. denied, 10-14-54, 348 U.S. 839, 99 L.ed. 661).

On October 31, 1969, the Superior Court granted the motion; and on November 3, 1969, formal judgment of dismissal was entered accordingly (see Appendix A to the petition herein). Notice of the entry of said judgment was served on Farmer on or about

November 7, 1969, which date marked the commencement of the 60-day period within which an appeal from the judgment might have been taken (Rule 2(a), *California Rules on Appeal*).

No such appeal was ever taken. Instead, on or about November 24, 1969, Farmer filed in the State Court of Appeal at San Francisco a petition for a "writ of mandate" to require the trial Court "to reverse its ruling" that the action be dismissed, and to "proceed with the action". That petition was denied by the Court of Appeal, without opinion, by order dated and filed on December 5, 1969 (Appendix B to the petition herein).

Farmer thereupon filed in the Supreme Court of California a petition dated December 11, 1969, for a hearing by that Court, after the order entered by the Court of Appeal on December 5, 1969. This petition was denied by the Court, without opinion, by order filed December 23, 1969 (Appendix C).

It should be noted particularly, that on the date last mentioned, Farmer had still until and including January 6, 1970 (i.e., about 14 days) within which he might have appealed from the judgment of dismissal rendered by the trial Court.

ARGUMENT

1. TO THE EXTENT THAT ANY RIGHT OR PRIVILEGE IS HERE ASSERTED UNDER ANY FEDERAL STATUTE, THE ISSUE THUS PRESENTED HAS BEEN SQUARELY DECIDED ADVERSELY TO PETITIONER.

While Farmer's statement of the issue presented here is somewhat confused (his brief, pp. 2-3), his contentions are summarized in his conclusion (brief, p. 28), in essence that "there is no statutory or other authority for a state Court to dismiss an FELA case properly brought under Section 6 of the Act (45 USCA 56)".

This precise claim has been rejected at least twice by this Court. In *Missouri v. Mayfield* (1950), 340 U.S. 1, this Court (at pp. 4-5) said:

> "A State may reject the doctrine of forum non conveniens in suits under the Federal Employers Liability Act because it may deem itself compelled by federal law to reject it. Giving the opinion of the Supreme Court of Missouri in these cases a scope most favorable to reliance on a non-federal ground, doubt still remains whether that Court did not deem itself bound to deny the motions for dismissal on the score of forum non conveniens by its view of the demands of our decisions in Baltimore & Ohio R. Co. v. Kepner, 314 US 44, 86 L ed 28, 62 S Ct 6, 136 ALR 1222, and Miles v. Illinois Cent. R. Co. 315 US 698, 86 L ed 1129, 62 S Ct 827, 146 ALR 1104.
>
> But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers Liability Act if in similar cases the State for reasons of local policy denies resort to its courts

and enforces its policy impartially, see McKnett v. St. Louis & S.F.R. Co. 292 US 230, 78 L ed 1227, so as not to involve a discrimination against Employers Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers Liability Act empowers their courts to entertain suits arising under it. There was nothing in that Act even prior to Section 1404 (a) of the 1948 revision of the Judicial Code, Title 28, USC, which purported to 'force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse.' Douglas v. New York, N.H. & H.R. Co., supra (279 US at 388, 73 L ed 752, 49 S Ct 355).

Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law. To that end, we vacate the judgment of the Supreme Court of Missouri and remanded the cause to that Court for further proceedings not inconsistent with this opinion."

Following the *Mayfield* decision, the *Price* case (*Price v. A.T. & S.F. Ry. Co.* (1954), supra (42 C. 2d 577, 268 P.2d 457, 43 A.L.R.2d 756), came before the Supreme Court of California. In its essentials, that case was virtually identical with the case at bench. Price, the plaintiff, was a railroad employee residing in New Mexico. The defendant railroad was

(and is) a corporation organized and domiciled in Kansas, with substantial operations in New Mexico, and like extensive operations, including an important major headquarters, in California. Price brought suit under the FELA, in the Superior Court of California for Los Angeles County, predicated upon alleged accidents occurring in New Mexico. All of the essential witnesses were shown to be located in New Mexico. To carry the similarity further, the attorney who principally represented Price is also the attorney who now principally represents Farmer in the case at bench.

In *Price*, the defendant railroad moved for dismissal on the ground of *forum non conveniens*. As in the case at bench, its motion was granted, and judgment was entered accordingly. Price then appealed to the State Court of Appeal (259 P.2d 664); and following the Appellate Court's decision, the case was brought to the State Supreme Court.

(In contrast with *Price*, in the case at bench no appeal was taken, after judgment of dismissal *forum non conveniens*. Farmer elected instead to proceed in the reviewing Courts of California by petition for mandate.)

In the Supreme Court of California, Price made the same contention now made by Farmer; namely, that he had "an absolute right" to have his case retained in and tried before the Court of his choice in California, once venue was established as provided by Section 56 of FELA (see 42 C.2d, p. 586; and compare pp. 5-7 of Farmer's brief herein). This po-

sition was in line with the earlier decision of the California Court in *Leet v. Union Pac. R. Co.* (1944), 25 C.2d 605, in which it was held that in FELA cases brought in the Courts of California, there was "no room" for the doctrine of *forum non conveniens*, and that in such a case the plaintiff's right to select the forum was absolute.

This holding was, however, squarely overruled by the California Supreme Court in *Price*, in which the Court relied upon and quoted from this Court's opinion in *Mayfield*, saying (42 C.2d, at pp. 583-584):

> "The Leet case, discussed hereinabove, appears to have presented the first instance in which the doctrine of forum non conveniens has been considered and discussed by this court, and as already mentioned we rejected it in connection with the FELA litigation there involved because of our belief that we were so compelled by the decision of the United States Supreme Court in the Miles case. But since that court, in the Mayfield case, has now lifted that compulsion (if it ever intended any), we perceive no reason why the doctrine should not be available in this state, upon a proper showing and without discrimination against either non-citizens of California or against FELA cases."

In due course, Price filed in this Court his petition for certiorari to the Supreme Court of California (No. 180, October Term, 1954). Following a reply filed by the respondent railroad, certiorari was denied without opinion (October 14, 1954), 348 U.S. 839, 99 L.ed. 661.

It may be noted that in the *Price* petition and brief primary reliance was placed upon certain decisions of this Court which are again strongly relied on in Farmer's present petition (pp. 3, 5, 6); particularly:

Baltimore & O. Ry. Co. v. Kepner (1941), 314 U.S. 44, 86 L.ed. 28;

Miles v. Illinois Central R. Co. (1941), 315 U.S. 698, 86 L.ed. 1129;

Pope v. A.C.L. R. Co. (1953), 345 U.S. 379, 97 L.ed. 1094.

It was then Price's argument, and it is now similarly argued by Farmer, that under these decisions a plaintiff-employee in an FELA case has an absolute right to select any forum in which venue can be laid, and that this choice cannot be defeated or disturbed on the ground of *forum non conveniens*.

The simple answer to this contention, and the answer accepted and given effect in both *Mayfield* (by this Court, 340 U.S. at pp. 4-5), and *Price* (by the California Court, 42 C.2d, at pp. 581-582) is that neither *Kepner* nor *Miles* has any bearing upon the application of *forum non conveniens* in an FELA case; and, of course, the same is true of *Pope*, inasmuch as this Court denied review in *Price* even though *Pope*, together with *Kepner* and *Miles*, was cited and relied upon by the petitioner therein.

The right and power of a state Court to dismiss an FELA case on grounds of *forum non conveniens* was more recently recognized in *Parsons v. Chesapeake & O. R. Co.* (1963), 375 U.S. 71, 11 L.ed.2d 137, in which this Court compared the "discretionary

determinations" required in state and federal courts in cases in which such motions are presented. While this Court held, in *Parsons*, that dismissal of an FELA action by a state Court on grounds of *forum non conveniens* was not conclusive upon a federal Court in which an identical action was filed following such dismissal, the Court did not hold, or in any way suggest, that the state Court was not fully empowered to act as it did in the state action; and apparently no such contention was made by either party: see 11 L.ed.2d at pp. 991-992, where the briefs of the litigants are summarized.

Under Section 1257 (3) of Title 28, USCA, and Rule 19 (a) of the Rules of this Court, certiorari to a state Court will not as a rule be granted when a right or privilege is set up or claimed under federal law, unless the federal question decided by the state court is one of substance, which has not heretofore been decided by this Court; or is one which has been decided by the state Court in a way probably not in accord with applicable decisions of this Court.

It has been consistently held that no *substantial* federal question is presented, requiring consideration or review by this Court, when that very question has been settled by previous decisions of this Court. *Leonard v. V.S. & P.R. Co.* (1905), 198 U.S. 416, 49 L.ed. 1108; *Minneapolis, etc. R. Co. v. Merrick* (1920), 254 U.S. 376, 65 L.ed. 312; *Utley v. St. Petersburg* (1933), 292 U.S. 106, 79 L.ed. 1155.

Bypassing for the moment whether a federal question is truly presented, when the only actual question

is whether a trial Court of a state has properly dismissed an FELA complaint on grounds of *forum non conveniens*, it is clear in this case that the federal question, if any, thus presented is not "substantial"; that said question, to the extent that any federal implications are involved, has been determined heretofore by this Court; and that the "decision" of the California Supreme Court is in accord with the applicable decisions of this Court.

It follows that no basis exists for the granting of the petition on the ground that a substantial federal question is presented requiring resolution by this Court.

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2. THE ACTION OF THE STATE COURTS IN THE CASE AT BENCH WAS AN EXERCISE OF POWERS EXISTING UNDER STATE LAW, AND DID NOT GIVE RISE TO ANY FEDERAL QUESTION.

While there is a federal statute (28 U.S. Code, Section 1404-a) which empowers federal Courts to transfer actions from an inconvenient, to a more convenient forum, the state Courts in the case at bench did not undertake to act pursuant to that statute. Instead, the trial Court (whose action was *twice* in effect approved, by the reviewing Courts, by denial of mandate) applied the doctrine of *forum non conveniens*, as developed in the Courts of the several states (and in federal practice, also) long prior to the enactment of Section 1404-a. Compare:

Gulf Oil Co. v. Gilbert (1947), 330 U.S. 501 (504-506), 91 L.ed. 1055;

Broderick v. Rosner (1935), 294 U.S. 629 (643), 79 L.ed. 1100;

Williams v. North Carolina (1942), 317 U.S. 287 (294), 87 L.ed. 279;

Douglas v. N.Y.N.H. & H.R. Co. (1929), 279 U.S. 377, 387, 73 L.ed. 747.

As already shown, this Court, in the *Mayfield* decision, specifically held that whether *forum non conveniens* should be applied in an FELA case brought in a state Court was essentially a question of state rather than federal) law, saying (340 U.S. at p. 4):

> "But if a State chooses to '[prefer] residents in access to often over-crowded courts' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers Liability Act. Douglas v. New York, N. H. & H. R. Co., 279 US 377, 387, 73 L ed 747, 751, 49 S Ct 355. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of forum non conveniens, a question of State law not open to review here."

The correctness of the decision of the California Court in *Price,* and thus in the case at bench, is attested by not only this Court's denial of certiorari in *Price,* but also numerous decisions in the courts of review in the several states in which similar action was taken. Typical decisions of this kind include:

Gonzales v. A.T. & S.F. Ry. Co. (1962), 189 Kan. 689, 371 P.2d 193 (citing *Price,* 371 P.2d 197);

C. & O. Ry. Co. v. Donovan (1964), 30 Ill.2d 178, 195 N.E.2d 634;

Johnson v. C.B. & Q.R. Co. (Minn., 1954), 66 N.W.2d 763 (citing *Price,* 66 N.W.2d, pp. 774-775);

Ramsey v. C.G.W.R. Co. (Minn., 1957), 77 N. W.2d 176;

Maynard v. C. & N.W.R. Co. (Minn., 1957), 77 N.W.2d 183;

St. Louis-S.F. Ry. Co. v. Superior Court (Okla., 1955), 290 P.2d 118;

A.T. & S.F. Ry. Co. v. District Court (Okla., 1956), 298 P.2d 427;

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Mooney v. D. & R. G. W. R. Co. (1950), 118 Utah 307, 221 P.2d 628;

Southern Ry. Co. v. McCubbins (Fla. App. Ct., 1967), 196 So.2d 512, 514-516;

Elliott v. Johnson (1956), 365 Mo. 881, 292 S.W.2d 589.

Farmer's argument is essentially that the *Mayfield* and *Price* decisions should nevertheless be disregarded, because (as he asserts) *venue* of his action was properly laid in the trial Court; that under FELA, and the decision of this Court in *Pure Oil Co. v. Suarez* (1966), 384 U.S. 202, 15 L.ed.2d 474, Great Northern is a "resident of California for *venue* purposes"; and such venue "residence" removes this case from the application of either the *Mayfield* or *Price* decisions.

To this argument there are two conclusive answers: (1) the *Pure Oil* case had nothing to do with a trans-

fer of an action, *forum non conveniens,* or with the FELA; in fact, neither was referred to in the opinion, even in passing; (2) questions of *venue* are irrelevant to the application of *forum non conveniens,* except that venue must exist, in order that dismissal or transfer on grounds of *forum non conveniens* may be ordered. In the *Gulf Oil* case this Court declared (330 U.S., at pp. 504, 506-507):

> "It is conceded that the venue statutes of the United States permitted the plaintiff to commence his action in the Southern District of New York and empower that court to entertain it. But that does not settle the question whether it must do so. Indeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue. . . .
>
> . . .
>
> In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

This statement of the law was accepted and relied upon by the Supreme Court of California, in the *Price* decision (42 C.2d, at pp. 580-581).

In this behalf, reference may be had again to the *Parson* case, *supra* (375 U.S. 71, 11 L.ed.2d 137), in which this Court apparently recognized the propriety of dismissal by a state court of an FELA case on grounds of *forum non conveniens,* notwithstanding that venue was properly laid.

3. THE DECISION OF THE SUPREME COURT OF CALIFORNIA SOUGHT TO BE REVIEWED RESTS UPON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT, AND CERTIORARI MUST THEREFORE BE DENIED.

The "judgment" which Farmer here seeks to have reviewed is in terms, and in fact, a simple order (without opinion) entered by the Supreme Court of California on December 23, 1969 (Appendix C to Farmer's petition to this Court). By that order, the Court denied Farmer's petition to that Court for a hearing, following the denial (on December 5, 1969) of his petition to the State Court of Appeal for a writ of mandate directed to the trial Court.

As stated in the petition to this Court, Farmer's petition for mandate was assertedly based upon Section 400 of the Code of Civil Procedure of California. The judgment of the trial Court which Farmer thus attacked had been entered on November 3, 1969, and notice thereof had been served upon him on or prior to November 7, 1969.

While neither the order of December 23, 1969 (by the California Supreme Court) nor the order of December 5, 1969 (by the Court of Appeal) contain any specification of the reasons which persuaded those Courts to act as they did, there are at least two distinct non-federal grounds, each of which is independently adequate to support those orders; and each of said grounds is likewise independent of any consideration of any federal question which may or might be claimed to be presented here.

These two non-federal grounds are:

(a) There was no basis in Section 400, California Code of Civil Procedure, for the procedure by mandate attempted by Farmer;

(b) Apart from Section 400, it is the settled statutory and decisional law of California that a litigant may not proceed by mandate, to correct a supposedly erroneous judgment of a trial Court, when he has a plain, speedy and adequate remedy by appeal.

Section 400 by its terms provides only for a procedure to be followed when a Superior Court (such as the trial Court here) has made an *interlocutory* order "*granting or denying* a motion to change the place of trial" of an action. No such motion was presented to the trial Court in this case, nor was any such order made. The trial Court's "order" was for the entry of "judgment of dismissal"; and such judgment was duly entered on November 3, 1969, as stated above. No decision of the California courts of review has been cited, and none has come to the attention of Great Northern's counsel, in which the procedure under Section 400 has been approved, where a final judgment was under attack. The decision cited by Farmer at page 4 of his petition (*State Farm etc. Co. v. Superior Court* (1956), 47 C.2d 428) involved only an interlocutory order preliminary to trial, and even then did not involve Section 400 in any way.

Apart from Farmer's misconception of the applicability of Section 400, his petition for mandate was

wholly improper because at the time of its presentation he had a plain, speedy and adequate remedy by appeal from the trial Court's judgment of November 3, 1969. Under Rule 2(a) of the California Rules on Appeal, an appeal may be taken from a judgment rendered by a Superior Court, by filing a written notice of appeal with the clerk of that Court within 60 days after the receipt of notice of entry. Farmer thus might have appealed at any time up to a date not earlier than January 6, 1970. He did not do so, but instead elected to proceed by petition for mandate, filed as above stated in the State Court of Appeal on or about October 27, 1969.

There is not and never has been in this case any claim that Farmer did not have a remedy by appeal from the trial Court's judgment, or that this remedy was not plain, speedy and adequate. Notably, in the *Price* case, where the same attorneys who now represent Farmer were counsel for the plaintiff Price, an appeal was taken to the Court of Appeal from the trial Court's judgment of dismissal (42 C.2d, p. 579).

The governing statute of California contemplates that a writ of mandate will not be issued when there is a plain, speedy and adequate remedy by appeal: *Code of Civil Procedure*, Section 1086; *Andrews v. Police Court* (1943), 21 C.2d 479; *Butler v. Superior Court* (1927), 82 C.A. 322. In particular, it is the rule of decision in California that a litigant may not resort to mandate as a substitute for appeal: *Neal v. State* (1960), 55 C.2d 11, 15; *Lincoln v. Superior Court* (1943), 22 C.2d 304, 311; *Early v. Mannix*

(1860), 15 Cal. 149, 150; *Wadey v. Justice Court* (1959), 176 C.A.2d 426, 428.

While the challenged order of the Supreme Court of California does not in terms specify that the petition was denied because predicated upon an inapplicable statute, or because mandate was inappropriate in a case where a remedy by appeal was or had been available, there can be no question but that these factors were duly considered by the Court. The experienced Justices who comprise that Court are not unaware of the pronouncements in the earlier cases, cited *ante*, in which mandate has been held not to be available as a substitute for an appeal. The Court's omission of a specific declaration to that effect in conjunction with its denial of mandate is therefore not of particular significance.

This Court has many times held that the question whether, in a case brought before this Court for review, the state Court's decision could be rested upon independent state grounds did not necessarily require an express declaration to that effect by the state Court; rather, the basic question was whether a decision upon a federal issue was essential to the state Court's ruling, or whether, on the other hand, the ruling could be supported entirely on state grounds irrespective of the decision of the supposed federal question. This Court has indicated that in passing upon this fundamental question, the circumstances disclosed of record are to be considered, especially if the state Court has not expressed its views in a formal opinion or set of conclusions. *Rich-*

ardson Machine Co. v. Scott (1928), 276 U.S. 128, 133; *New York v. Atwell* (1923), 261 U.S. 590, 592; *Radio Station W.O.W. v. Johnson* (1945), 326 U.S. 120, 129.

More succinctly stated, the rule is that review by this Court may not be had, unless it affirmatively appears on the face of the record that a federal question was duly presented to the State Court, and was expressly or necessarily decided by that Court. *Whitney v. California* (1927), 274 U.S. 357, 360; compare: *Herb v. Pitcairn* (1945), 324 U.S. 117, 128; *Buck v. California* (1952), 343 U.S. 99, 103.

No such affirmative showing appears in this record. To the contrary, and irrespective of the supposed federal question asserted by Farmer, the "decision" of the Supreme Court was completely supportable on the ground that Farmer, by seeking to proceed under Section 400, C.C.P., had misconceived his remedy, or the equally valid ground that under state law and practice mandate is not available as a substitute for appeal, or when a plain, speedy and adequate remedy by appeal is or has been available. It follows that no basis is presented for the exercise of this Court's jurisdiction, and that the petition should be denied.

CONCLUSION

The petition herein, like the petition for mandate in No. 1634-Misc., presented during this term by this same petitioner, is for the sole purpose of obtaining the reversal of this Court's decision in the *Mayfield* case, and the subsequent decision of the California Supreme Court in the *Price* case (in which this Court denied review, as shown above). Nothing new is presented which would warrant such action by this Court. In fact, the instant petition is in large part a repetition of the petition for review filed with this Court in the *Price* case; and that petition was in turn largely a reproduction of the dissenting opinion in *Price* (42 C.2d at pp. 587-601).

For each and all of the reasons set forth herein, the petition should be denied.

Dated, Oakland, California,
March 20, 1970.

Respectfully submitted,
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